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No. 82-6

In the Supreme Court of the United States

OCTOBER TERM, 1982

GILBERT L. DOSIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Hobbs Act, 18 U.S.C. 1951, requires proof of force, threats or fear to establish an extortion committed "under color of official right."

2. Whether the Hobbs Act's proscription of extortion "under color of official right" is void for vagueness.

3. Whether a government agency is an "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*

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In the Supreme Court of the United States

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GILBERT L. DOZIER, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 672 F.2d 531.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1982, and a petition for rehearing was denied on May 13, 1982 (Pet. App. 33a-34a). The petition for a writ of certiorari was filed on July 12, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Louisiana, petitioner was convicted of conducting the affairs of the Louisiana Department of Agriculture through a pattern of racketeering activity (Count 1), in violation of 18 U.S.C. 1961; and of obstructing interstate commerce by extortion (Counts 2, 3 and 5), in violation of 18 U.S.C. 1951 (the Hobbs Act). He was fined $25,000 on Count 1 and sentenced to consecutive terms of five years' imprisonment on Counts 1 and 2. He was placed on five years' probation on Count 3, and imposition of sentence was suspended on Count 5. The court of appeals affirmed in a comprehensive opinion (Pet. App. 1a-30a).

1. The evidence at trial showed that from 1976 through 1980, petitioner was the Commissioner of Agriculture of Louisiana, an elective office. During this period, he solicited funds from persons or businesses that were affected by the Department of Agriculture. In return for those payments, petitioner promised to aid the extortion victims by his official actions. If the requested payments were withheld, however, he threatened to treat the victims unfavorably. As the court of appeals summarized (Pet. App. 9a), "[s]omeone would solicit [petitioner's] aid as Commissioner—assistance in dealing with a state agency, appointment to a state board, a state contract or loan guarantee—and [petitioner] would name his price."

For instance, Floyd Giles hoped to obtain a charter to open a livestock auction barn from the state Livestock Board. Petitioner, who had boasted to others that he controlled the Board, instructed Giles to bring $20,000 to a meeting at which they would discuss the

matter (Pet. App. 8a-9a). Giles told petitioner that he would bring $10,000 to the meeting and would pay the remaining $10,000 when he got the charter. Petitioner accepted the $10,000, and promised to give it back to Giles if the charter were not obtained. No charter was obtained, but the money was never returned (*id.* at 9a).[1]

Louisiana milk processors asked petitioner to lower the price of Louisiana milk to forestall the influx of cheaper milk from Mississippi. In return, petitioner demanded $200,000—$10,000 from each major processor and $5,000 from the smaller processors (Tr. 1433-1437, 1615-1618, 1630-1631).[2] He also promised to make the person serving as the conduit for the payment a member of the Dairy Stabilization Board (Tr. 1625).[3]

Alvin Burger, the president of a pest control company, was experiencing certain difficulties with the Louisiana Structural Pest Control Commission (Tr. 262-269). Petitioner promised to help Burger with his problems before the Commission in exchange for a $20,000 political campaign contribution. Burger agreed to the payoff but later withdrew (Tr. 278, 281).[4]

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[1] This act of extortion was the subject of the Hobbs Act violation charged in Count 2.

[2] "Tr." references are based on transcript references in the government's brief in the court of appeals.

[3] This extortionate scheme was the subject of the Hobbs Act violation charged in Count 3.

[4] This demand constituted the Hobbs Act violation charged in Count 5. In addition to the extortions charged in the three Hobbs Act counts, the RICO count enumerated nine other similar incidents.

ARGUMENT

1. Petitioner first contends (Pet. 10-13) that the Hobbs Act, 18 U.S.C. 1951, prohibits extortions committed "under color of official right" only if they are accomplished by "threats, fear, or duress." This claim is answered by the plain language of the statute. Section 1951(b)(2) (emphasis added) defines extortion as

> the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, *or* under color of official right.

It is clear from the use of the disjunctive that Congress prohibited alternative means of extorting property, and the courts of appeals have consistently so held. *United States* v. *Williams*, 621 F.2d 123, 124 (5th Cir. 1980), cert. denied, 450 U.S. 919 (1981); *United States* v. *Cerilli*, 603 F.2d 415, 425-426 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *United States* v. *Harding*, 563 F.2d 299, 305-306 (6th Cir. 1977), cert. denied, 434 U.S. 1062 (1978); *United States* v. *Brown*, 540 F.2d 364, 371-372 (8th Cir. 1976); *United States* v. *Hall*, 536 F.2d 313, 320-321 (10th Cir.), cert. denied, 429 U.S. 919 (1976); *United States* v. *Hathaway*, 534 F.2d 386, 393 (1st Cir.), cert. denied, 429 U.S. 819 (1976); *United States* v. *Trotta*, 525 F.2d 1096, 1100 n.7 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976); *United States* v. *Braasch*, 505 F.2d 139, 151 n.8 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975); *United States* v. *Kenny*, 462 F.2d 1205, 1229 (3d Cir.), cert. denied, 409 U.S. 914 (1972). As the Fifth Circuit previously recognized (*United States* v. *Williams*, *supra*, 621 F.2d at 124), "[t]he coercive element is supplied by the existence of the public office itself." For

this reason, even at common law, a public official could be convicted of extortion without proof of threats, force or duress. See *United States* v. *Nardello*, 393 U.S. 286, 289 (1969); *United States* v. *Williams*, *supra*, 621 F.2d at 124.

2. Petitioner further contends (Pet. 13-19) that even if the Hobbs Act is properly construed as reaching extortion "under color of law" without proof of threats, force or duress, it is unconstitutionally vague as applied to solicitations of political contributions. Distilled to its essence, however, the question raised by petitioner is more accurately framed as whether the court of appeals correctly construed the district court's instructions as directing the jury to convict petitioner on the Hobbs Act counts only if they found that he had solicited sums of money in exchange for specific instances of official action or inaction.[5] Such a question, tied to the language of this particular set of instructions, is not one of general importance warranting review by the Court. In any event, the court of appeals correctly construed the district court's instructions.

After reading to the jury the statutory definition of extortion (18 U.S.C. 1951(b)(2)), *i.e.*, "the ob-

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[5] Petitioner initially contends (Pet. 13-15) that the generally accepted theory of "under color of official right" extortion—that a government official may be convicted simply upon a showing that he took fees to which his office did not entitle him and the giving of which was motivated by the authority of his office—may not constitutionally be applied to an elected official who must solicit contributions for his campaigns. Petitioner concedes (Pet. 15-16), however, that the court of appeals found it unnecessary to decide this question, since it concluded that petitioner was properly convicted for taking sums of money in exchange for specific official actions. Accordingly, petitioner's claim reduces to a contention that the court of appeals misconstrued the district court's instructions to the jury that convicted him (see Pet. 17-19).

taining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right," the court defined the different ways in which the statute could be violated, including the taking of money "under color of official right" (App., *infra*, 1a-3a).[6] Read as a whole, tne instruction concerning this latter phrase clearly required the jury to find that petitioner had made a specific use of his official powers to induce a contribution (*id.* at 2a-3a; emphasis added):

> Extortion under the color of official right is the *wrongful* taking by a public officer of money or property not due him or his office, whether or not the taking was accomplished by force, threats, or use of fear. In other words, *the wrongful use* of otherwise valid official power may convert dutiful actions into extortion. So, *if a public official threatens to take or withhold official action for the wrongful purpose of inducing a victim to part with property, such a threat would constitute extortion, even though the official was already duty bound to take or withhold the action in question.*

The court also made it clear to the jury that the solicitation of campaign contributions, standing by itself, is "a lawful and permissible political activity" (*id.* at 4a): "The solicitation of campaign contributions is a necessary and permissible form of political activity on the part of persons who seek political office and persons who have been elected to public office. However, campaign contributions can be the subject of public bribery and extortion *provided the essential*

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[6] We have attached the entire Hobbs Act charge as an appendix.

elements of these offenses are proven beyond a reasonable doubt" (Tr. 3270-3271; emphasis added). Such solicitations thus could provide the basis for a conviction for extortion only if they were accompanied by the "wrongful use of otherwise valid official power" (App., *infra*, 3a). Under these instructions, the jury was clearly directed that it could convict on the Hobbs Act counts only if it found that petitioner had wrongfully exercised the powers of his office to obtain money; it could not find him guilty simply because, in his capacity as an officeholder, he had solicited political contributions from persons in an industry regulated by his office. The court of appeals therefore correctly sustained the instructions (Pet. App. 14a-17a). See *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973).[7]

3. Petitioner also attacks (Pet. 7-9) his RICO conviction. He contends (Pet. 19-23) that the Louisiana Department of Agriculture is not an "enterprise," as that term is defined in 18 U.S.C. 1961(4).[8] But the courts of appeals uniformly have held that a public office or governmental entity can be a RICO enterprise, and this Court consistently has

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[7] Moreover, this is not a case that even arguably involved mere campaign solicitations. Rather, the evidence overwhelmingly revealed a clear pattern of petitioner's demanding payments for specific exercises of his official power. Thus, he demanded $20,000 from Giles in exchange for an auction barn charter; he demanded $20,000 from the milk processors in exchange for the reduction of the price of milk; and he sought $20,000 from Alvin Burger as a fee for intervening on Burger's behalf before the Structural Pest Control Commission. See pages 2-3, *supra*.

[8] Section 1961(4) defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity * * *."

denied petitions for certiorari raising this issue. See, *e.g.*, *United States* v. *Thompson*, Nos. 81-5176, *et al.* (6th Cir. Aug. 4, 1982), petition for cert. pending, No. 82-5440 (en banc) (governor's office);[9] *United States* v. *Angelilli*, 660 F.2d 23, 30-35 (2d Cir. 1981), cert. denied, No. 81-1237 (Feb. 22, 1982) (civil court); *United States* v. *Sutherland*, 656 F.2d 1181, 1198 (5th Cir. 1981), cert. denied, No. 81-1289 (Feb. 22, 1982) (municipal court); *United States* v. *Lee Stoller Enterprises, Inc.*, 652 F.2d 1313, 1316-1319 (7th Cir.) (en banc), cert. denied, No. 81-396 (Nov. 30, 1981) (sheriff's office); *United States* v. *Long*, 651 F.2d 239, 241 (4th Cir.), cert. denied, No. 81-281 (Oct. 13, 1981) (state senator's office); *United States* v. *Clark*, 646 F.2d 1259, 1261-1267 (8th Cir. 1981) (office of county judge); *United States* v. *Bacheler*, 611 F.2d 443, 450 (3d Cir. 1979) (traffic court).

This long line of authority is bottomed on the plain language of the statute itself. Clearly, the Louisiana Department of Agriculture falls within the "legal entity" component of the definition of "enterprise." See 18 U.S.C. 1961(4). As this Court held in *United States* v. *Turkette*, 452 U.S. 576, 580 (1981), "[t]here is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact." Moreover, petitioner points to no "clearly expressed legislative intent" to exclude governmental entities, and therefore the unambiguous statutory language must prevail. *Ibid.*

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[9] The en banc Sixth Circuit thus has overruled the only court of appeals' decision on which petitioner relies and that he cites as creating a conflict among the circuits on this issue (Pet. 20-23).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1982

APPENDIX

I shall now instruct you on the law pertaining to the federal extortion statute.

Title 18, United States Code, Section 1951(a) provides in part that: "whoever in any way or degree obstructs[,] delays, or affects commerce or the movement of any article or commodity in commerce by extortion" shall be guilty of an offense against the United States.

There are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

First: That the defendant induced the person described in the indictment to part with property;

Second: That the defendant did so knowingly and willfully by means of extortion; and

Third: That the extortionate transaction delayed, interrupted or adversely affected interstate commerce.

Section 1951 prohibits extortion as well as the attempt to commit extortion. Thus, the Government bears the burden of proving beyond a reasonable doubt that the defendant was either guilty of extortion or guilty of attempting to commit extortion. An attempt to commit extortion is shown when the Government proves beyond a reasonable doubt that the defendant willfully attempted to obtain property from another through the use of actual or threatened force, violence or fear, or under the color of official right. It is not necessary that the attempt to extort be successful or that any property was actually obtained by the defendant.

Extortion means the obtaining of property from another, with his consent, induced by wrongful use

of actual or threatened force, violence or fear, or under color or official right.

The term property includes not only money or other tangible things of value, but also includes any intangible right considered as a source or element of income or wealth.

The term fear means a state of anxious concern, alarm or apprehension of harm, and it includes fear of economic loss or damage as well as fear of physical violence. The fear need not have been actually caused by the defendant. The statute is satisfied if the defendant intended to exploit the fear.

The Government does not have to show either that the fear was a direct consequence of the threat of economic loss or that the victim personally feared the defendant. It is not necessary that the Government show that there were any explicit demands for personal payoffs or explicit threats of adverse consequences if the payment is not made. Subtle extortions are covered under the federal extortion act and the Government satisfies its burden of proof if it shows circumstances surrounding the alleged extortionate conduct that rendered the victim's fear of threatened loss reasonable.

Threatening to take official action, even where it is action that the public official is duty bound to take, for the purpose of coercing the victim to pay the public official can be extortion if the Government satisfies its burden of proving each essential element of the offense beyond a reasonable doubt.

The term wrongful means the obtaining of property unfairly and unjustly by one having no lawful claim thereto.

Extortion under the color of official right is the wrongful taking by a public officer of money or

property not due him or his office, whether or not the taking was accomplished by force, threats, or use of fear. In other words, the wrongful use of otherwise valid official power may convert dutiful actions into extortion. So, if a public official threatens to take or withhold official action for the wrongful purpose of inducing a victim to part with property, such a threat would constitute extortion, even though the official was already duty bound to take or withhold the action in question.

While it is not necessary to prove that the defendant specifically intended to interfere with interstate commerce, it is necessary as to this issue that the Government prove that the natural consequences of the acts alleged in the indictment would be to delay, interrupt or adversely affect interstate commerce, which means the flow of commerce or business activities between two or more states.

The term commerce, as used in this statute, deals with interstate commerce, that is commerce between the states.

It is not necessary that the subject of the extortion constitute interstate commerce or that the purpose of the extortion be to affect interstate commerce, or that the defendant intended to affect interstate commerce. All that is required is that trade or commerce be affected by the extortion in any way, or that the unlawful conduct obstructed, delayed, affected interstate commerce or the movement of commodities in such commerce.

The effect of extortion on commerce does not have to be simultaneous with the extortion. A threatened effect on interstate commerce is sufficient to bring the statute into play regardless of the absence of any actual effect.

It is the duty of the judge and not the jury to determine whether the Government's evidence established that interstate commerce was affected. You need only decide whether you believe beyond a reasonable doubt the evidence offered by the Government to establish an effect on interstate commerce. Therefore, I instruct you that if you believe the evidence offered on interstate commerce, the requisite effect upon interstate commerce has been met.

As you know, the parties have introduced testimony regarding alleged campaign contributions. It is for you to determine, based on the facts of this case and in accordance with the instructions I have just given to you relating to the federal extortion statute, whether the payment and/or solicitation of campaign contributions constitutes a violation of the federal extortion statute or was a lawful and permissible political activity.

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